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No. 10,186

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY
(a corporation),
Appellant,

vs.

CHARLES HANSEN,
Appellee.

APPELLANT'S REPLY BRIEF.

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THE FACTS.

Appellee's statement of facts fails to contain citations to the record for many of the matters asserted therein. (Brief for Appellee, pp. 2-5.) Appellee asserts, on page 2 of his brief, that "on the first night out from San Francisco some sea was encountered and the beams fell over and were in effect strewn all over the deck". There is no citation to the record in support of this statement. The record shows that the steel moved or shifted as the result of heavy seas. (R. 100, 101.)* The photographs referred to (Brief for Appellee, p. 2) do not show the condition of the deck at

*The record is referred to throughout this brief by the designation "R.".

the time of the accident but several days later, after part of the deck cargo had been removed. (R. 21.)

Appellee also states that the "Captain wished to top the booms or get them in working position in order to save time when the vessel arrived at Honolulu". (Brief for Appellee, p. 3.) We find nothing in the record to support this statement. The record does show that the procedure of topping booms a day out of port is usual and customary on all ships. (R. 142, 158.) Reference is also made to four or five men used in the topping operation. (Brief for Appellee, p. 3.) The record shows that the entire crew, except the helmsman and second officer, was engaged in this operation. (R. 102, 142.) Appellee also states (Brief for Appellee, p. 2) that the steel beams were so heavy and so long and there were so many of them that it was impossible to restack them so as to put them in a safe condition. The record (R. 66) merely shows that it was impossible to restack them, because the material was too heavy (R. 162) for the ship's gear.

THERE IS NO PROOF OF NEGLIGENCE ON THE PART OF APPELLANT.

The Jones Act afforded seamen a modified common law remedy for negligence and the assumption of risk defense was much weakened. This proposition is well established. (See Appellant's Opening Brief, pp. 16, 17; *De Zon v. American President Lines* (C. C. A. 9th), 129 Fed. (2d) 404, 407.) But the seaman fails to make out a case under the Jones Act when there is no evidence of negligence and the only evidence is that

his injuries resulted from conditions which were not the fault of the shipowner or which were normally incident to his calling as a seaman. This statement is illustrated by the quotation from *Arizona v. Anelich* (298 U. S. 110), found at page 9 of appellee's brief. Those matters which appellee denotes as negligent acts arose not as the result of negligent failure by appellant but from conditions outside its control. The oil on the deck resulted from the operation of the winches which had to be greased and oiled preparatory to use. (R. 70.) Negligence cannot be predicated upon a condition which is the necessary result of the operation of the ship's gear.

Appellee also complains of the stowage of the deck cargo because it was not shored (Appellee's Brief, p. 8), but he is unable to cite any evidence in the record showing that the deck cargo should have been shored or that it would have been good seamanship to shore the deck cargo. This unproved assertion by appellee was affirmatively disproven by the evidence that shoring was impossible or impractical. (Appellant's Opening Brief, p. 19; R. 87, 131-132.)

In *Hansen v. U. S.* (U. S. District Court), 1933 A. M. C. 472 (Appellee's Brief, p. 8), the plaintiff was injured when a jumbled pile of logs fell upon him during loading operations. The evidence showed that the stowing did not take place in accordance with usual custom. There is no such evidence in this case. In fact, the evidence affirmatively shows that the stowage did take place in accordance with usual custom and in a safe and seamanlike manner. (R. 100, 88; Appellant's Opening Brief, p. 6.)

In *Arizona v. Anelich,* 298 U. S. 110, also cited by appellee, the Court held that a steamship company was liable for negligently furnishing a seaman with defective equipment. The Supreme Court did not review (pp. 117, 118) the question of the negligent failure to furnish equipment, but considered the defense of assumption of risk under the Jones Act.

In *Beadle v. Spencer,* 298 U. S. 124, cited by appellee, the Supreme Court of the United States held that assumption of risk was not a defense in an action under the Jones Act for injuries resulting from negligently piled lumber. (p. 128.) The report of the Supreme Court of California in that case (4 Cal. (2d) 313, 48 Pac. (2d) 678) shows that the lumber had been "landed" on the deck rather than stowed as was customary, and had not been piled upon lathes or dunnage in order to make it solid. There was also evidence that the hatch into which the plaintiff fell should not have been opened and that it was unusual and uncustomary to load the deck so close to the hatch. In the instant case, the record shows that the steel was loaded on four inches of dunnage. (R. 85.)

Appellee endeavors to support the judgment on the ground that the Jones Act is to be liberally construed. This court has recently held that liberal construction does not dispense with the necessity of proof of negligence. In *De Zon v. American President Lines* (C. C. A. 9th, July 3, 1942), 129 Fed. (2d) 404, this court at pages 407 and 408 says:

> "We are reminded by plaintiff that this act 'is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to

> those dependent on his earnings' (Cortes v. Baltimore Insular Line, supra, 287 U. S. 367, 375, 53 S. Ct. 173, 176, 77 L. Ed. 368), but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (287 U. S. 372, 53 S. Ct. 174, 77 L. Ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. 'A seaman is not entitled to compensation or indemnity in the way of consequential damages for disabilities or effects occasioned by the sickness or injury, except in case of negligence.' 24 R. C. L. Sec. 218, p. 1164."

Appellant in the instant case has not claimed that proof of negligent stowage of deck cargo which proximately results in injury to a seaman will not result in a cause of action under the Jones Act. Appellant contends there is no evidence whatsoever of negligent stowage of deck cargo, and on the contrary the evidence affirmatively shows that the deck cargo was properly stowed in a customary and seamanlike manner. (Appellant's Opening Brief, pp. 18-21.) The error of the District Court was in concluding that since the deck cargo did shift from the force of the sea it had been negligently or improperly stowed. Such a conclusion is unwarranted in the face of evidence of proper stowage and in the absence of evidence of wherein the stowage was improper. Moreover, in the instant case not only was the stowage conducted in the customary and usual manner but the booms were topped in accordance with usual practice. There was

no evidence that it was customary to place walkways over the deckload or that such walkways would have been possible of construction. Where the use of such appliances is neither customary nor practical, the failure to furnish them is not negligence.

Red River Line v. Smith (C. C. A. 5th), 39 C. C. A. 620, 99 Fed. 520;

Adams v. Bortz (C. C. A. 2d), 279 Fed. 521, 526.

CONCLUSION.

As we urged in our opening brief, the question presented by this appeal is whether there is substantial evidence to support the finding of negligence on the part of appellant. Evidence of an accident is not proof of negligence. A seaman's life by its nature is a hazardous one and accidents through the fault of no one are particularly liable to occur. (*The Iroquois,* 194 U. S. 240, 243, 24 S. Ct. 654, 48 L. Ed. 953.) Appellant submits that the evidence in this case fails to establish any lack of care or conduct inconsistent with safe and seamanlike practices.

It is, therefore, respectfully urged that the judgment of the District Court be reversed.

Dated, San Francisco, California,
October 17, 1942.

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